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UNITED STATES SUPREME COURT

OCTOBER 1982 TERM

SHOP & SAVE FOOD MARKETS, INC.,
PETITIONER

v.

PNEUMO CORPORATION, ABBOTT REALTY COMPANY AND P&C FOOD MARKETS, INC.,
RESPONDENTS

ON PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT (DOCKET NO. 80-9053)

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE IMPOSITION OF PENALTIES OR PRICE DIFFERENTIALS AS PART OF A CONSPIRACY TO FORCE ADHERENCE TO A TYING ARRANGEMENT OR BOYCOTT VIOLATES SECTION 1 OF THE SHERMAN ACT (15 U.S.C. §1).

2. IF SO, WHETHER THE EXACTION OF SUCH PENALTIES OR PRICE DIFFERENTIALS, IN LIEU OF ENFORCEMENT OF THE TYING ARRANGEMENT OR BOYCOTT, SANITIZES THE OTHERWISE ILLEGAL CONDUCT.

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REFERENCE TO REPORTS OF OPINIONS BELOW

Shop & Save Food Markets, Inc., Plaintiff v. Pneumo Corp., Abbott Realty Co. and P & C Food Markets, Inc., Defendants

Docket No. 78-44
(Coffrin, District Judge)

Opinion and Order dated July 21, 1980
Filed July 22, 1980

Not Reported
App. Item 1

Order dated October 17, 1980
Filed October 17, 1980

Not Reported
App. Item 2

Shop & Save Food Markets, Inc., Appellant, v. Pneumo Corp. Abbott Realty Co. and P & C Food Markets, Inc., Appellees

Docket No. 80-9053
No. 20 - August Term, 1981
(Feinberg, Chief Judge, Meskill, Circuit Judge and Palmieri, District Judge (sitting by designation from the Southern District of New York)

Opinion dated January 20, 1982
Filed January 20, 1982
(By Palmieri with Meskill,
in dissent)

Reported at CCH
1982-1 Trade
Cases Par. 64,496
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Opinion dated July 2, 1982
Filed July 2, 1982
(On Rehearing, by Meskill,
with Feinberg in con-
currence)

Reported at 683
F.2d 27
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STATEMENT OF GROUNDS FOR SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction over this Petition under 28 U.S.C. §1254(1) and Rule 17 of the Supreme Court of the United States Revised Rules.

-X-

STATUTES INVOLVED

15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §15

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(amended in 1980 to add provision not applicable to this proceeding)

STATEMENT OF CASE

a. Basis for Petition

As discussed in detail in the Argument beginning at page 14, the decision of the United States Court of Appeals for the Second Circuit is appropriate for issuance of a Writ of Certiorari for the following reasons:

1. The decision conflicts with principles established by the United States Supreme Court.

2. The decision conflicts with principles established by other Courts of Appeals, as well as with previous decisions of the Second Circuit.

3. The final decision was issued after rehearing, and represents a reversal of the position taken by the Second Circuit in its initial decision.

4. The decision was reached after intervention by the Antitrust Division

of the United States Department of Justice, which occurred after the Second Circuit's initial decision. In its Amicus Curiae memorandum, the Antitrust Division takes positions fundamentally inconsistent with those formerly prosecuted, vigorously and successfully, by that Division.

b. Background

The Petitioner brought this action in 1978 in the United States District Court for the District of Vermont (the "District Court"). Original jurisdiction was conferred on the District Court by 15 U.S.C. §15 and 28 U.S.C. §1337.

The Petitioner alleged that the Respondents had conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. §1). It alleged

further that as part of such conspiracy, the Respondents sought to impose a tying arrangement on the Petitioner and to force the Petitioner to observe a boycott of the Respondents' competitors, both of which schemes were illegal under Section 1 either as per se violations, or under a rule of reason analysis. The Petitioner alleged further that it had suffered damages as a direct result of such violations.

The District Court (Coffrin, Judge) entered Summary Judgment against the Petitioner, holding that the Respondents had not been successful in imposing a tying arrangement or forcing adherence to a boycott and that any injury suffered by the Petitioner was therefore not antitrust injury.

The Petitioner appealed to the United States Court of Appeals for the

Second Circuit (the "Second Circuit"). On January 20, 1982, the Second Circuit, in an opinion by Palmieri, Judge, (sitting by designation from the Southern District of New York,) with Feinberg, Chief Judge concurring, affirmed the District Court's opinion with respect to the boycott claim and reversed it with respect to the tying claim. Meskill, Judge, dissented from the portion of the opinion reversing the District Court.

The Respondents filed a Petition for Rehearing, which was supported by an Amicus Curiae memorandum filed by the Antitrust Division of the United States Justice Department, pursuant to its recently adopted policy of intervening in private actions. The Petition for Rehearing was granted, and on July 2, 1982, the Second Circuit issued a new

opinion, written by Meskill, Judge, affirming the District Court in all respects.

c. Facts

Since the Petition arises out of an affirmance of summary judgment, there have been no findings of fact entered below. Nevertheless, the initial Complaint and affidavits make allegations and support the drawing of inferences as follows:(1)

In 1970 the Petitioner established a grocery store in Lyndonville, Vermont, in a new shopping center. The location was obtained through Abbott Realty Corp., which was the prime tenant under

(1) In this recitation of facts and inferences to be drawn thereform, the Petitioner obviously states them in the light most favorable to its position, as is warranted by Rule 56(c) of the Federal Rules of Civil Procedure. United States v. Diebold, Inc., 369 U.S. 654 (1962).

a lease with the owner. Abbott was then under common ownership with the Cross Company, the wholesale supplier from which the Petitioner bought substantially all its groceries. The Lyndonville store was designed and constructed for the Petitioner. The Petitioner negotiated the terms of the prime lease with the owner, and had supervision over the entire proceedings. The Petitioner had the full expectation that it would have possession of the premises for the initial 20-year term of the lease, with options to renew for an additional 15 years. However, the Petitioner did not obtain a written sublease, relying instead on its good relationship with Abbott and Cross. The Petitioner saw Abbott as no more than a nominal prime tenant, holding the prime lease for the

sole purpose of providing the financial stability required by the owner.

In short, it was the Petitioner's store.

In 1972, Pneumo acquired Abbott and Cross and for the next several years relations remained cordial.

In 1976 when the Petitioner had the opportunity to lease a new facility in Derby, Vermont, it sought financial backing on the lease from Pneumo. This opportunity arose when another grocery chain (unrelated to the parties) abandoned the facility. At the time there remained 15 years on the original lease, with options to renew for an additional 15 years. After delays, Pneumo offered to take over the lease and sublease it to Petitioner for five years, rather than for the remaining term. It is fair to infer that Pneumo

did so in order to retain control over the location and, among other things, be in a position to force the Petitioner to purchase groceries from Cross. Finding these conditions unacceptable, the Petitioner sought assistance from another source, a competitor of Cross, and obtained the benefit of the full lease term, plus the opportunity to renew through options. In gratitude, Petitioner began purchasing wholesale groceries for that location from that source. Petitioner continued to purchase from Respondents for all of its other locations.

The Petitioner has alleged that the Respondents, upset by Petitioner's course of action, decided to retaliate. At that time, if not before, Respondents entered into an agreement

and conspiracy to unreasonably restrain trade and punish the Petitioner in one or more of several fashions. In particular, Respondents decided to open a P & C store in direct competition with Petitioner. In addition, Respondents considered evicting Petitioner and taking over its Lyndonville location. Respondents also attempted to assure the purchase of groceries by the Petitioner at wholesale from Cross (and thereby to prevent Petitioner from purchasing from other competitors) by conditioning a sublease to the Lyndonville facility on an agreement to purchase from Cross. Respondents conspired to offer a sublease at the then existing rent if the Petitioner's purchases were made from Cross, and at a penalty rent if not. A variation of this coercive

arrangement was the offer to Petitioner of a sliding scale rent reflecting the level of purchases from Cross. Furthermore, Respondents decided to withhold from the Petitioner any renewal options under the sublease even though the prime lease contains a fifteen year renewal period. It is a fair inference that these options were withheld in order to exert further control over Petitioner at the time the initial term of the sublease expired.

In furtherance of this conspiracy the Respondents engaged in numerous overt acts aimed directly at the Petitioner. First, on December 6, 1976, Pneumo told Petitioner it could have a sublease in Lyndonville only if it purchased from Cross. Petitioner was also informed that if it agreed to such purchases its rent would not be

increased. These statements were made during the same conversation in which Pneumo told Petitioner of its plans to open a St. Johnsbury P & C store. Petitioner was stunned by these communications and sought to clarify its position with the Respondents. In subsequent conversations, occurring approximately the same time, Petitioner requested a private label, to avoid having to compete directly against a P & C retail facility under common control with Petitioner's supplier in the supplier's products. This request was refused.

When the Petitioner objected to the purchasing requirement, it was eventually told that it could have a lease, but with a 57.5% base rent increase to $31,500. When Appellant objected to this, it was offered a

sliding scale rent, with rent ranging from the then existing level of $20,000 to $31,500, in inverse proportion to the level of purchases from Cross.

This latter offer was accepted by Petitioner, because it believed it could mitigate the rent increase by purchasing non-Cross labels and thus avoid having to compete with P & C in its own labels. After further discussions, the parties also agreed to the other terms of the sublease. However, when the Petitioner decided to open another facility in St. Johnsbury, the Respondents, in order to prevent this or in retaliation for this decision, withdrew all offers to lease the Lyndonville facility to the Appellant. After being threatened with suit by the Petitioner, the Respondents again offered a sublease to the

Petitioner, but with the 57.5% increase in rent, and without the renewal options. Having no alternative, the Petitioner accepted this offer.

The Petitioner maintains that the conspiracy and agreement among the Respondents continues to this date. On no occasion has the Petitioner been offered a lease on the same terms as would have been available had the Petitioner agreed to purchase its wholesale groceries from Cross or to refrain from purchasing from Cross' competitors. The Respondents will continue to receive the penalty rent until the initial term of the lease expires. At that time they will be in a position to use their prime lease to the Lyndonville store to force additional concessions, or to damage the Petitioner further by eviction.

Allegations supporting the above interpretation, and facts suggesting its complete plausibility, were before the District Court and the Court of Appeals.

d. Argument

On appeal to the Second Circuit the Petitioner argued that the District Court was in error in (i) applying incorrect standards in granting summary judgment; (ii) examining constituent elements of the Respondents' conspiracy, rather than examining the conspiracy as a whole; (iii) denying Petitioner's standing to sue on its boycott claim; and (iv) holding implicitly that the elements of a violation are different in private, as opposed to government enforcement, action. The Petitioner considers those

and other issues to be important subsidiary issues to this litigation, and, if this Petition is granted, the Petitioner will argue those issues in its brief on the merits.(2) The opinion of the Second Circuit does not address those issues, however, because it holds that on the facts alleged by the Petitioner there simply cannot be a violation of Section 1 of the Sherman Act. Accordingly, this Petition addresses only the controlling questions decided by the Second Circuit.

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(2) The Petitioner has also alleged and briefed the specific components of the violations it claims in this litigation, including the requirements under tying cases that the plaintiff show economic power in the tying product, the involvement of a "not insubstantial" amount of commerce in the tied product, and coercion. These issues also would be addressed by Petitioner in its brief on the merits.

As stated above, those questions are:

1. WHETHER THE IMPOSITION OF PENALTIES OR PRICE DIFFERENTIALS AS PART OF A CONSPIRACY TO FORCE ADHERENCE TO A TYING ARRANGEMENT OR BOYCOTT VIOLATES SECTION 1 OF THE SHERMAN ACT (15 U.S.C. §1).

2. IF SO, WHETHER THE EXACTION OF SUCH PENALTIES OR PRICE DIFFERENTIALS, IN LIEU OF ENFORCEMENT OF THE TYING ARRANGEMENT OR BOYCOTT, SANITIZES THE OTHERWISE ILLEGAL CONDUCT

The District Court did not decide the first of these issues as it affected tying arrangements. It answered the second of the issues in the affirmative, however, holding that since there was no completed tie there was no violation. The District court did not consider whether the use of penalties in attempts

to impose boycotts was illegal, because it held in effect that persons paying those penalties could not be within the target area unless they are persons at whom the boycotts, not the penalties, were specifically aimed.

The Second Circuit affirmed the District Court on the boycott issue without discussion. And, in its second opinion, it upheld the District court on the tying issue, stating "an attempt to force a tie which results only in an agreement to pay a higher price for the tying product is not a tying violation." 683 F.2d 27 at 31.

1. Tying Arrangements

The principle that penalties or price differentials can demonstrate coercion of a purchaser to submit to a tying arrangement has long been

recognized. Among the earliest decisions were certain patent misuse cases, where penalty royalties were extracted for licensing under a tying patent unless the licensee also paid royalties for licensing under tied patents, or where the royalty for the tying patent has been as high as that for the tying and tied patents together. See, American Securit Co. v. Shatterproof Glass Corp., 154 F.Supp. 890 (D.C. Del. 1957), aff'd 268 F.2d 769 (3d Cir. 1959), cert. denied, 361 U.S. 902 (1959); National Foam System, Inc. v. Urquhart, 202 F.2d 659 (3rd Cir. 1953); Barber Asphalt Corp. v. La Fera Grecco Contracting Co., 116 F.2d 211 (3rd Cir. 1940). Although these cases were not decided strictly under Section 1 of the Sherman Act, they applied Sherman Act tying standards in

determining that extension of a patent monopoly through tying arrangements constitutes patent misuse and have on that basis denied the patent owner the right to maintain infringement actions.

This Court dealt with the price differential issue in United States v. Loew's, Inc., 189 F.Supp. 373 (S.D.N.Y 1960), vacated and remanded (to expand scope of injunction), 371 U.S. 38 (1962). In that case the District Court entered a decree enjoining certain "block booking" practices of the defendants in forcing television stations to take unwanted movies in order to obtain desired movies. The District Court found the practices of the defendants to be illegal tying arrangements. The opinion examined several different methods used by the various defendants to force the taking

of unwanted films, including one scheme in which the defendant offered only one price, the minimum package price, and would refuse to complete any transaction at less than the minimum price. The Court characterized this scheme as follows: "[The Defendants] never said 'you must take all 371 or 222 of these films.' They merely said 'you must pay for all 371 or 222 films.'" 189 F.Supp. at 388.(3)

Recognizing that the same result could be achieved by establishing price

(3) The District Court also held that where the price differential between a film offered separately and offered as part of a package was de minimus, there was no violation. 189 F.Supp. at 386. Cf. Smithkline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089 (E.D. Pa. 1976), aff'd on other grounds, 575 F.2d 1056, 1061, n. 3 (3rd Cir. 1978), cert. denied, 439 U.S. 838 (1978), involving a 3% differential.

differentials between the desired film purchased separately and the same film purchased as a package, the District Court enjoined the defendants from

> (C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films. (Emphasis added.)

189 F.Supp. at 399.

On appeal, this Court affirmed the holding of the District Court that the defendants had engaged in illegal tying arrangements, and strengthened the above provision of the decree by prohibiting any price differential between films offered individually and as part of a package, unless cost justified. 371 U.S. at 54.

The Court allowed to stand another portion of the District Court decree which enjoined the Defendants from "Conditioning or tying, or attempting to condition or tie, the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license of any other film." (Emphasis added.) 189 F.Supp. at 399.

No subsequent opinion of this Court suggests that the vitality of the Loew's opinion has been sapped.

See also Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), and Oxford Varnish Corp. v. Ault & Wibourg Corp., 83 F.2d 764 (6th Cir. 1936), where package pricing or penalties were held illegal under Section 1 of the Sherman Act.

The Second Circuit previously recognized a variation of the package price differential issue. In Hill v. A-T-O Inc., 535 F.2d 1349 (2d Cir. 1976), the defendants offered membership in a buying service which enabled the purchasers, allegedly, to obtain large discounts on certain merchandise. In order to become a member, however, a purchaser was required to buy a vacuum cleaner. The defendants attempted to avoid tying implications by asserting that the membership was given away free with each purchase of a cleaner. The Court responded:

> [W]e believe this point irrelevant for purposes of tie-in analysis. To hold to the contrary would permit escape from the antitrust proscription against illegal tie-ins by the simple device of offering both products as a unit at a single price, while claiming that one of the two is a "free giveaway."

Id. at 1354.

2. Boycotts

This Court has consistently held that group boycotts or concerted refusals to deal are per se illegal under Section 1 of the Sherman Act. United States v. General Motors Corp., 384 U.S. 127 (1966); Silver v. New York Stock Exchange, 373 U.S. 341, reh. denied, 375 U.S. 870 (1963); Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

As demonstrated by the many cases analyzing group boycotts, the prohibited restraint of trade is not defined by a static model. Rather, the Court has recognized several types of boycotts. For example, in Klor's, Inc. v. Broadway-Hale Stores, Inc., Id., a case involving, as does this case, both

horizontal and vertical aspects, the Court held that a conspiracy in violation of Section 1 of the Sherman Act existed among manufacturers, distributors and retailers either not to sell goods to the plaintiff-retailer or to sell them only at discriminatorily high prices and on highly unfavorable terms. Id. at 209.

The Petitioner was in much the same position as the plaintiff in Klor's, as being the object of a conspiracy among the Respondents to deprive it of a lease or to make it available "only at discriminatorily high prices and on highly unfavorable terms." At the same time, the Petitioner was being coerced into participating in a boycott of the Respondents' wholesale competitors.

It has long been recognized that Section 1 of the Sherman Act prohibits

so-called "secondary boycotts," that is, coercion of one party in order to induce that party to refrain from dealing with a third party. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). In Eastern States, members of associations of retail lumber dealers circulated lists of wholesalers who sold lumber directly to consumers. No overt pressure was exerted upon members to refrain from dealing with the blacklisted wholesalers, nor was there any express agreement not to deal. This Court, however, looked beyond the surface of the activity and analyzed the scheme in the entire context in which it occurred. The Court stated

> When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade there can be but one

> purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. ... True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealiers to supply the trade which they regard as their own.... [C]irculation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns."

Id. at 608-9. (Emphasis added.)

Thus, the Supreme Court has made it clear that even "low pressure" tactics designed to induce a person to refrain from dealing with a third person violate the antitrust laws. If more direct tactics are employed, namely imposition of a specific penalty, the conduct

should be seen more clearly as a violation. And as indicated in Eastern States, Id., the entire history of the parties' dealings with each other as well as the competitive context surrounding those dealings are relevant in determining whether illegal coercion has occurred.

In the analogous area of Federal Trade Commission Act proceedings, this Court has in the past faithfully applied the general principles laid down in the foregoing cases. In Fashion Originators Guild v. F.T.C., 312 U.S. 457 (1941), as in this case, the prohibited activity involved coercion of parties in order to influence their conduct toward third parties. In that case, the Federal Trade Commission challenged certain practices of an organization of textile manufacturers and retailers in the

ladies' garment industry. Members of the Guild were prohibited from dealing with retailers who purchased ladies' dresses from so-called "style-pirates" who had appropriated original dress designs from Guild members. Id. at 82. Thus, the sanctions applied to fellow retailers were designed with the ultimate object of eradicating third party style pirates.

This Court expressly recognized the broad antitrust implications of the Guild's activities, stating:

> Not only does the plan ... conflict with the principles of the Clayton Act; the findings of the [Federal Trade] commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself .... [The Guild's plan] has both as its necessary tendency and as its purpose and effect the direct suppression of competition ....

Id. at 465.

3. Results of Violations

If it remains illegal to use penalties and price differentials to force tying arrangements or boycotts, the Petitioner indisputably would have a cause of action if it alleged that, by such means, it was coerced by the Respondents into purchasing unwanted products. The present posture of this litigation at this time is attributable solely to the fact that the Petitioner is now paying the penalty instead of making such purchases.

The argument advanced by the Respondents and accepted by the District Court and Second Circuit is, in effect, as follows:

> Per se illegal conduct resulting in injury to the person against whom it is aimed, becomes legal if the conduct does not achieve the most predictable, classic, result. An attempt to tie or force a boycott, which results in direct receipt of a

penalty is "unsuccessful," and therefore legal.

This is much like saying that once the ransom is paid and the hostage released, there has been no kidnapping.

Per se antitrust analysis, by its very definition, examines conduct, not result. As the Court stated in Northern Pacific Railway v. United States, 356 U.S. 1 (1958)

> [T]here are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they had caused....

Id. at 5.

Similarly in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1971), the Court stated

> By §1, Congress has made illegal: "Every contract, combination...or conspiracy in restraint of trade or commerce among the several States....Congress having thus prescribed the criteria of the

> prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

Id. at 660.

And in Broadcast Music, Inc. v. C.B.S., 441 U.S. 1 (1979) the Court recognized the extreme nature of per se liability once again in admonishing against the casual and premature creation of new categories of per se violations.

Structuring a scheme to engage in per se illegal conduct in a way that anticipates alternative results (both of which benefit the violator and harm the target) does not change the nature of the conduct. The Supreme Court recognized, in Associated Press v. United States, 326 U.S. 1 (1945), this ability of offenders to pattern their

conspiracy to put them in a "heads we win, tails you lose" position.

In Associated Press , the Court affirmed an opinion of a three judge District Court, written by Judge Learned Hand, which held to be illegal certain by-laws of the Associated Press imposing severe conditions to membership on newspapers who were competitors of existing members. United States v. Associated Press, 52 F.Supp. 362 (S.D. N.Y. 1943), aff'd sub nom. Associated Press v. United States, 326 U.S. 1 (1945). Associated Press had previously been the subject of suits based on restrictive conditions to membership, and had revised its by-laws to provide for two separate procedures for attaining membership. The first procedure, which applied to newspapers that did not compete with existing

members, was simple. It allowed the board of directors of Associated Press simply to grant membership, with no conditions. The second procedure which could be invoked by existing members if the applicant were a competitor, was more onerous. First, it required the applicant to pay to Associated Press 10% of all payments made by the applicant's competitor, since the inception of Associated Press. Second, it required a vote of a majority of all members. Third, it required the applicant to make available to Associated Press all of its news sources on the same terms as they were available to the applicant. In examining the condition of payments, the District Court stated:

> The conditions which they may exact when an applicant secures such a vote are plainly designed in the interest of preventing competition. The first is the payment of ten per cent of all the assessments paid by

> members in the same "field" for a period of over forty years: the payment to be distributed among those who have paid the assessments. This upon its face appears an exaction designed to compensate the applicant's competitors for the loss of their differential advantage, and incidentally to act as a deterrent. ... The evidence proves beyond doubt that, ... the payments as a whole were also designed to compensate competitors for the loss in value of their membership, arising out of the applicant's improved position as a competitor. (Emphasis added.)

52 F.Supp. at 371.

On appeal, this Court affirmed, quoting the above language with approval. 326 U.S. 1, 11 n. 5.

Under this analysis, the Respondents in this case were not failures in their attempt to impose a tie or a boycott. They received the tribute they deemed necessary to allow the Petitioner to escape their tie and boycott and to pressure their anticompetitive edge. Under Associated Press, that too is illegal.

The Respondents and the Justice Department argued below that by recognizing, in its initial decision, a remedy in favor of the Petitioner, the Second Circuit was creating a new category of per se violation in disregard of this Court's warnings in Broadcast Music. Judge Meskill advanced the same proposition both in his dissent and in his majority opinion on the final decision.

What is overlooked by this position is that sustaining the Petitioner's claims does not require creation of a new violation. The principles of tying and boycotts have been long established, and the prohibition against the use of penalties or price differentials in connection with such schemes has also long been recognized as illegal.

Indeed, the requirement of Broadcast Music that per se illegal conduct always, or "almost always" result in a restraint on competition recognizes the possibility that on occasion it may not.

The test, from the Petitioner's standpoint, was whether it was injured as a result of conduct recognized as per se illegal, and not whether the Petitioner might fall within an improbable statistical minority whose injury comes about in a manner that (arguably) does not restrain trade.

Petitioner's contentions are further supported by an examination of the reasons for the non-classic result in this case. To begin with, the Petitioner was up against a conspiracy composed of its landlord, a wholesale supplier, a retail competitor and the company controlling all of them. The

combination of horizontal and vertical overtones of this configuration remove it from pure vertical restraint analysis.

Next, in most cases the "success" of a restraint is measured by the amount of the tied product sold and business diverted from competitors. None is being sold in this case for the following reasons. At the same time the Respondents were seeking to impose their tie, they were also pouring the foundations for a retail grocery store that would compete directly with the Petitioner. The Petitioner therefore faced the nightmarish prospect of being forced not only to purchase all of its wholesale groceries from the Respondents' wholesale arm, but also to compete directly with their retail arm in those same products, including the

wholesaler's private, "Red & White" label. The Petitioner was refused even the ability to obtain its own private label, so that the Respondents' anti-competitive edge at the retail level could have been made less glaring.

The penalty to be exacted for the Petitioner's escape was then offered, and then mitigated through the offer of the sliding scale rental. With no apparent alternative, the Petitioner accepted this offer. A completed tie, and a predictable result!

Had the case reached the court in this posture the legal outcome also would have been entirely predictable. The Respondents did nothing after that to cure their violations, such as offering a lease without a buying requirement, and without a penalty rent. Instead, they revoked their offer of a

lease altogether and threatened to evict the Petitioner if it carried out a proposal to open a new retail location in the Respondents' new territory. This threat made what went before all the more egregious, and as the Second Circuit pointed out in its initial decision, would have amounted to a per se violation if carried out. Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961). When the untenability of this position was pointed out to the Respondents, the lease now in effect, which embodies a penalty, was reoffered. Approximately a year and a half after "negotiations" began, the Petitioner got a lease. The rent increase reflected exactly the amount of the penalty the Respondents sought from the outset as their price to allow escape from their conspiracy.

In short, the Respondents' actions after they had successfully imposed a tie did not purge their violations. It compounded them.

It also cannot be overlooked that it was the Respondents here, not the Petitioner, who established the rules of the game and left the Petitioner with no alternative but to pay the penalty. The Petitioner in fact agreed, under duress, to the Respondents' tying scheme, and lost even that "opportunity" when it decided to open a new store that would compete with the Respondents' new retail store.

4. Justice Department Intervention

The intervention in this case of the Antitrust Division of the Justice Department is significant for two reasons. First, the mere fact of intervention undercuts the efficacy of

the private attorney general concept which has been lauded by this Court for decades as an effective component of antitrust enforcement. Illinois Brick Co. v. Illinois, 431 U.S. 720, reh. denied, 434 U.S. 831 (1977); Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969); Waldron v. Cities Service Co., 391 U.S. 253, reh. denied, 393 U.S. 901 (1968). The Petitioner in this case as well as nearly all other private litigants, relies on solid principles developed in actions instituted by the Justice Department since the beginning of this century. Its intervention here seems to signal an intent to unwrite a great deal of that precedent.

A second, and equally troubling, significance is the position argued by the Antitrust Division in its Amicus

Curiae memorandum below. That position can be fairly summarized to state that the Antitrust Division proposes to do away with per se analysis in all vertical restraint cases. Its argument relies on this Court's decision in Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977). That case indeed did away with the per se approach in examining territorial restrictions, in the process overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). However, the Court in no way implied that vertical restraints should not be subject to per se analysis. On the contrary it announced explicitly a return to the standard articulated in Northern Pacific Railway Company v. United States, 356 U.S. 28 (1958) for determining whether particular vertical restraints should be

declared per se illegal. Northern Pacific, of course, subjected tying arrangements to the per se rule, so the Antitrust Division's position in this regard is totally insupportable.

By intervening here, the Justice Department has declared to aspiring tying violators that their conduct will be immune if structured as follows. First, in forcing a tie, do not insist upon purchase of the tied product. Instead, establish a price for the tying product that varies according to the amount of tied product purchased, so that the economic equivalent of sales of the tied product will be received regardless of sales volume in the tied product. If a substantial number of purchasers obtain the tied product without complaint, then the scheme will have been successful, at least in the

Second Circuit. See Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974), holding that the absence of complaint indicates the lack of coercion designed to force purchases of the tied product. If on the other hand, a purchaser objects, withdraw the pricing differential, and load the margins from lost sales of the tied product into the price of the tying product.

This scheme will work particularly well in the grocery industry, in which it is customary for wholesalers to obtain control of retail locations which are then leased to, hopefully, complaisant retailers.

In other words, if handled right, tying arrangements will henceforth be immune from enforcement proceedings. And the Justice Department stands ready to

intervene to extend that immunity to defendants in private treble damage actions.

5. Rule of Reason Analysis

The Petitioner alleged both that the Respondents' conduct was per se illegal and that it unreasonably restrained trade. The decisions below have held that the Respondents' conduct was not per se illegal in ruling against the Petitioner. Since the case has not advanced beyond summary judgment, the Petitioner has not yet been given any opportunity to prove that the conspiracy unreasonably restrained trade. Under the doctrine of Broadcast Music, Inc. v. C.B.S., 441 U.S. 1 (1979) it should be given that opportunity.

6. Conclusion

The Petitioner's allegations are quite simple. The Respondents entered

into a conspiracy designed to enhance their competitive edge at the wholesale and retail level and to impose a tying arrangement on Petitioner and force participation in a boycott. These acts when attempted in their classic form have been held per se violations of Section 1 of the Sherman Act, Northern Pacific Railway v. United States, 356 U.S. 1 (1958), Fashion Originators Guild v. F.T.C., 312 U.S. 457 (1941), as well as in a more subtle form, through package or penalty pricing; United States v. Loew's, Inc., 371 U.S. 38 (1962); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Had they resulted in their most obvious goals, little dispute would exist over the outcome of this case. Instead, for the reasons described above, they resulted in actual payment of the

penalty established by the Respondents as the Petitioner's only route of escape. As established in Associated Press v. United States, 326 U.S. 1 (1945), that penalty has the same antitrust character as the successful imposition of a tying arrangement or boycott.

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